

**EPISTEMOLOGICAL SCEPTICISM AND
NEUTRALITY IN THE SCIENCE OF LAW:
SOME CRITIQUES OF THE *CRITICAL THEORY* OF LAW**

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1. Introductory note. Something to remember.

Some time ago, Bertrand Russell firstly and Karl Popper later on, reflected upon problems regarding knowledge. Particularly, about the practical consequences that can arise from the adoption of certain epistemology, not only for the scientific activity itself, but also for ethics and politics¹. Popper explains how a wrong epistemological theory can produce such effects and provide two examples: (i) the first one refers to what he calls epistemological *optimism*, based on the idea that *the truth is obvious*, this is a belief that, despite having accompanied the birth of modern science and technology and contributed to the freedom of thought², dispenses with the fact that it is often difficult to get to the truth, and once it is found it could be lost again easily, because of that Popper attributes to this belief to have

¹ Karl Popper, *The development of scientific knowledge – conjectures and refutations* -, Paidós, 1967, p. 11 et seq. Retelling of a Popper's conference delivered on January in 1960, which expresses this coincidence with Russell on this point, remembers that the latter had said, for example, that 'epistemological relativism', or the idea that there is not an objective truth, and 'epistemological pragmatism', *id est* the idea that truth and usefulness are the same thing, are both closely linked authoritarian and totalitarian ideas (from Russell in *Let the people think*, 1941). On the same issue it could see, among others: b. Russell, *Unpopular essays* (1950), Hermes, 2nd ed. In Spanish 1963, and K. Popper, *The open society and its enemies* (1945, 1966), Paidós, 1992.

² This idea underlies, according to Popper, the teachings of Bacon and Descartes.

provoked disappointments that led to sceptical attitudes³ and also caused several forms of bigotry⁴; (ii) on the opposite side Popper mentions *scepticism* or epistemological *pessimism*, which is born from a contrary idea, equally wrong, consisted in a radical distrust of the power of human reason to discern truth, and it is also prone to fall in an “absolute authority”, which establishes “truth” and proclaims it. In one way or another, such approaches have inspired authoritarian conceptions, and have twisted the right way of scientific research as well⁵.

In the context described, as introductory note to what will be said later, I have found relevant to refer to certain Popper’s observations on the epistemological scepticism. He says that the belief in the possibility of a rule of law, of an equitable justice, the establishment of fundamental rights and a free society, can survive to the recognition that the judges are not omniscient and can make mistakes about the facts, and that, in practice, absolute justice is never done in a particular trial. But this belief in the possibility of a rule of law, justice and freedom, cannot survive the acceptance of an epistemology for which there are no “objective facts”, *not only in a particular case, but in any case*, and for which a judge can not commit a factual error because, in terms of facts, *he cannot be right or wrong*⁶.

³ Popper says that many disillusioned epistemologists would break their own previous optimism and build an authoritarian theory on the basis of a pessimistic epistemology, and he thought that the greatest of the epistemologists, Plato, exemplifies this tragic evolution (op. cit., p. 16).

⁴ Because if, either by divine revelation or by simple reading of nature, the truth is evident, how could anyone refuse to recognize it? Only either acting with malice or being a victim of a *conspiracy* to plunge him ignorance of this obvious truth. Popper points out how conspiracy theories influenced in religious persecutions, the Marxist conception (when it accuses the ‘capitalist press that it perverts and suppresses the truth’), and the remaining authoritarian doctrines (op. cit., p. 14-15).

⁵ The eminent Austrian epistemologist, from his own experience, notes that in the search for the truth, the best plan could be: begin with the criticism of our strongest beliefs (op. cit., p. 13).

⁶ Op. cit., chap. II, p. 11.

In light of the remembrance of these reflections, as I suggested in a recent symposium⁷, I will examine some issues which, in the same way, may arise in the field of the theory of law. To do that, I will be focusing on certain tenets of the so-called '*critical legal theory*', from the formulation of one of its most prominent exponents, Duncan Kennedy⁸. I will analyze these proposals and give a brief outline of a different perspective. I will begin with a summary of this thesis (2), to later on point out objections that I find in its formulation, from the point of view of their logical coherence (3) and its practical consequences (4).

2. The interpreter faces the according to Duncan Kennedy. Nothing is what it seems [Now you see me].

In a nutshell, according to the opinion of the aforementioned author, judges -and lawyers-, in their role as interpreters of the law, are immersed in a context dominated by *ideologies* which affect their judgments about the solutions that will be drawn from the legal order for individual cases that have to be resolved⁹. He noted that while they attempt to show *the legal necessity of their solutions* regardless of ideology, in fact they cannot get rid of *strategic behavior*, that is, the choice of one of the possible solutions of the legal problem, based on *external* reasons, basically on their ideological preference. Kennedy considers that this circumstance is *ineradi-*

⁷ Held in the School of Law of the Buenos Aires' University, from 5 to 7 May 2014, it had large attendance and dealt with different issues about philosophy of law, under the theme *Rationality in Law*.

⁸ Four studies of this author have been published under the title '*Left and right*'. I will focus my attention on the first one, dealing with *strategic behavior in legal interpretation*, and the second: *a left phenomenological alternative to the Hart and Kelsen legal interpretation theory*. These studies, found in the *Critical Legal Studies (CLS)*, are preceded by a good introduction by translator, Guillermo Moro, ed. Siglo XXI, 2013.

⁹ Kennedy's reflections are essentially concerned with American judges. That's what he announces at the beginning (p. 27) and other passages of his book (v. gr. p. 36, 95). In his presentation he defined *ideology* as an *universalization project from an intelligentsia that considers itself acting 'for' a group whose interests are in conflict with those of other groups* (sic, p. 28, see also quote from Mannheim, p. 95). It is a wide meaning apparently, although less clear, and the only examples mentioned are *liberalism* and *conservatism*, in the sense that he attributes to these trends in American society, warning that, above their differences, both assume a general structure and similar argumentative elements, which only differs in its presentation.

cable of interpretation¹⁰, an adjective that anticipates his vision of the problem. It is always *possible* for the judge -he says- to adopt a strategic attitude toward materials [he refers to the rules], to try to make them mean something different from what they seemed at fist, or to *give then one meaning which excludes other initially possible*¹¹. That is why he says that judges are *ideological actors*, even irrespective of their own perception, that is, know it or not.

In another passage Kennedy seems to mitigate the rigour of the discourse and tries to take distance from a more radical view in terms of the presence of ideology in the Court's decision. He expresses that, from his point of view, the insistence that the law is always and everywhere ideological, that it is *a social construction from beginning to end*, etc., involves as much denial as the opposite position. And he adds that his theory *is so hostile to global criticisms of objectivity in law, whether they are made from old Marxist angle or the postmodern one, as to the claim that the judges can always be and in fact usually 'neutral'*¹². However, in the second study, by dealing with approaches by Hart and Kelsen on the interpretation of law, he restarts putting in the middle of the scene the activity of the interpreter (judge or lawyer). He insists that they not only *manipulates* the normative material to *build* the solution of the Hart's *penumbral zone*, or within the Kelsen's *framework*, but also in the previous step, to decides if it is possible to fit the case or not in that *area*, or if there is or not a matter of conflict, a gap, etc.

Inspired by a Marx's work, Kennedy insists now that the interpreter carries out a *legal "work"* to transform what would be called *initial apprehension* of the solution given by rules, in order to adapt it to his ideological preference. *Id est* that the *CLS (Critical Legal*

¹⁰ Kennedy, p. 28.

¹¹ Op. cit., p. 32. The judges thus resemble wizards who play with who play imagination of the audience, as in the film by Louis Leterrier ('*Now you see me*' or '*Nothing is what it seems*', 2013), creating mere plot appearances for their decisions, which would not have, however, real connection with the legal basis to which they relate.

¹² Op. cit., p. 63.

Studies) as he understands them¹³, accept the *positivist idea that the law is sometimes determinate and some times indeterminate*, but they claim that this is not inherent in the qualities norms, on the contrary it depends on the work of the interpreter and its *strategic success*, as a consequence of the *unknowable nature 'in itself' or 'essential' of the norm (sic)*¹⁴. Developing this perspective in contrast to the Hart's and Kelsen's position, he noted then that even when an interpretation is established, the work can destabilize it, i.e. the work can *tilt or move nuclei and frames*, in a bottom to top fashion opposite to the authors' views above mentioned and MacKormick too.

To complete the idea he adds that ideology slants work, which in turn slants nuclei and frames, which in turn, in the perspective of coherence, provide the means to produce other destabilization of other nuclei and frames. With this perspective, the *corpus of valid law*, is presented as the historical product of lawyers', jurists' and judges' works, who carriers out opposing ideological projects. What is more that *corpus is unpredictably* subject to destabilization by *future* working strategies with an ideological orientation¹⁵. Legal equipment only influences the outcome of particular cases in combination with an interpretive activity is not cognitive but consciously or unconsciously strategic, although inherently considered its "essence" is "unknowable"¹⁶.

There is a moment in which Kennedy's explanation changes focus. When the expert on judicial activity, concerned with presenting a tightly descriptive analysis of such activity, gives way to the committed intellectual who expresses his own '*ideological preference*', by praising the *activist* judge's performance, who consciously or unconsciously pursues his own ideological commitments, opposite to those who seek their neutrality *tacking unpredictable or centrist*

¹³ In other paragraphs it says that he adheres to what he calls a *phenomenological CLS left tendency* (pp. 94, 100).

¹⁴ Op. cit., pp. 90-93; the same idea is then repeated at pp. 100 and 101.

¹⁵ Op. cit., pp. 98, 99.

¹⁶ Idem, pp. 100, 101.

*positions*¹⁷. Kennedy considers *legitimate* the attitude of the first one, and adds that if the *activist* can't destabilize the rule by using conventional techniques, he has to find the argument so that the solution matches to his conception of Justice. Our author admits that his stance the difficulty of an *infinite regression* to know whether the destabilization occurred or not because of conventional techniques, but still prefers it to the others alternatives.

3. Objections from the point of view.

Perhaps the most remarkable feature in Duncan Kennedy's study, of which a quick view has been given, consists of having designed a *legal sociology*, and in particular a *judiciary sociology*, which investigates how judges' behave in their mission to create solutions for cases they have to decide. He proposes a typology of that behavior¹⁸, but he also indicates how he believes that *they should* act. I will leave out here other aspects involved in this interesting contribution, to concentrate on the question linked to the impossibility of an objective formulation about solutions coming from a legal order, and its virtual neutrality.

Through a speech that sometimes becomes unclear and still unsteady, although Kennedy seems to give something to positivism when he refers to a relative determination of the law, it is only in appearance. As we have seen, ultimately he insists on a 'critical' questioning and the potentially *destabilizing* role which allows the interpreter to remove normative material from its original sense with the *strategic work*. Thus, that material becomes inherently *unknowable*.

If we follow that line of argument, it is practically impossible to achieve an *objective knowledge* of the law. Because in any interpretation the interpreter's ideological orientation shall always prevail

¹⁷ Idem, pp. 95, 96. He attributes these ideas to judges who establish their ideological neutrality in two ways: alternating unpredictably between defined by ideologies in conflict, or coming up with a solution that gives something to each side.

¹⁸ According to the way of their response on the basis of ideological preference, he mentions three types of judges: activist, mediator and bipolar; but as a common feature he highlights the *denial* of ideological incidence, about this issue he explores a psychological explanation.

above the conclusions which could be drawn from the normative material. The *normative propositions* that attempt to describe the content of the rules could not be, in fact, susceptible of truth or falsehood. For the simple reason that it would not be possible to verify them, precisely because the interpreter's conditions hinder *objectives* judgments in this regard. And the ones which appear as such judgments would be, at best, a *mask* to hide ideology that is behind. The argument leads, therefore, to discard *a priori* the possibility of acquiring objective knowledge in *all* imaginable legal orders, either with purely theoretical purposes, or as a preliminary step in its application by the courts.

I find a paradoxical twist in the foundations of this thesis. To give compelling reasons in its favor, supporters have necessarily to start from that what they themselves consider a reliable version of the contents of the legal order. That is to say an 'objective knowledge' and a 'neutral interpretation of its rules'. Otherwise it would not be possible to assert that certain interpretations or any "work" that is attempted would produce a sort of *ideological degradation* of that order.

Only if an objective sense of norms which makes up this order is assumed, it is possible to speak of a distortion or inclined intelligence by the *ideological preference* of the interpreter. Because in Kennedy's opinion the indetermination of law does not concern with intrinsic barriers, *id est* obstacles caused by logical problems of inconsistency or incompleteness of the legal order, or semantic difficulties in comprehension of texts. *Realism* has highlighted these last difficulties and the *open texture* of normative language. It suggests the possibility of attributing different meanings to certain texts, situation which would lead to several alternative solutions, phenomena with different opinions about its consequences. But the theory we are talking about, beyond of semantic or logical problems, emphasizes the incidence of ideology, an *extrinsic* factor of the content of norms. And it does it in such a way that ideology becomes a decisive and uncontrollable factor.

Of course, beliefs, political opinions, points of view on multiple aspects of life, the temperamental inclinations and so on, are part

of judges' subjectivity (and legal systems operators as well), which affect what they do, and part of what they do is to resolve cases through the application of system rules. But this does not mean that it is not possible to obtain an objective knowledge of them provide normative solutions for such cases.

Moreover, if we start from the hypothesis that a particular extrinsic factor, in this case *ideology*, it prevails decisively in the understanding of the rules, the only rational alternative to support it lies in presupposing an objective sense of rules, which shall be considered '*true*' or '*reliable*', to be able to contrast it with other interpretations which, according to criticism, would be *influenced by ideology*. This paradox is hinted in Kennedy's argument when he admits an *initial sense* which is offered to the interpreter in a first understanding of applicable rules, preceding his *destabilizing* work. Also, when he attributes that work the *indetermination* of the normative material.

The observation is not irrelevant and reveals that in the thesis under analysis two different areas appear to be confusing: one that describes the interpretative activity of norms, with particular reference to what the judges do, and another not so obvious that tends to emphasize what they *have to* do. So the choice of an *epistemological pessimism* – with regard to the possibility of neutral and objective knowledge of norms -, loses consistency, because it appears to be inextricably linked to an invitation to judges so that in the pursuit of their 'conception of Justice' they put rules aside as much as it's necessary. I have no doubt that this idea is preceded by *the best intentions*¹⁹ but necessarily interferes and diverts the research.

On the other hand, beyond the context surrounding the thesis, the broad notion that the author gives to the word 'ideologies' should include *all* of them, i.e. any that an interpreter could stick to, whether *conservative* or *revolutionary*, maybe *liberal* or *authoritarian*, etc. But then, what ideology would the *activist* judge have to adhere suggested as a model? Kennedy doesn't seem to be willing to suggest support for those considered 'predominant' (conserva-

¹⁹ A legendary film by Ingmar Bergman (1992) had that title and showed how often our own behavior makes these 'good intentions' may be thwarted without one's awareness.

tism and liberalism) and which *ab initio* he disqualifies. To make matters worse, according to his idea, it is not possible to predict the direction of the ideological impact on the solutions that are developed from the rules of the system²⁰. These warnings complicate the support of this thesis even more.

4. Problematic consequences. Best intentions.

Finally, let me make some remarks regarding the practical consequences of the thesis that we have considered. The scepticism described can lead to a result not less harmful than the one it would apparently try to conjure²¹. If it is not possible to rely on that the rules of a legal system will have a significant impact on social dynamics and, above all, that mostly they will be followed loyally by the people responsible for applying then and developing solutions from the system for cases to be solved, the conclusion cannot be other than those people, at least implicitly, can actually leave the rules aside, depart from them and decide without affection to its objective sense, since this would be *impossible to find* after all.

If that epistemological perspective prevails, most likely there will be *anomie* in the system, encouraged by a conception that denies the laws capacity to govern people's behavior. The next logical step will be the search of an *authority* that, no matter the norms issued, rules *personally*, as much in the name of God, of the collective spirit, of the soul of people, from the poor classes, or whatever; that is, the road to authoritarian or totalitarian ideas.

The early resignation to the objective of knowledge and neutrality in legal theory is equivalent to advocating that judges or others juridical operators hold themselves, not to objectively considered norms - since it would not be feasible to find their objective sense- but to some of those *force-ideas* that could predominate in the culture and the society. The relatively recent history of 20th century

²⁰ Op. cit., pp. 47 and 102.

²¹ Apparently it would consist in changing the prevailing standards of interpretation to urge the interpretative transformation of certain rules -for example on property in the capitalist countries- to which a "huge and unfair impact on oppressed groups" is attributed (p. 101).

shows many examples of disastrous consequences for societies and individuals, which can cause this type of approaches about what the judges do and in particular what they *'have to do'* can cause.

The theory of law has debated for decade about its possible *neutrality*, and the debate has not become extinct yet. Sometimes it is just delayed, left aside, or considered as an outdated issue, a piece for epistemology Museum. And sometimes, some author considered that the defense of *political neutrality* in the work of the legal philosopher (*unequivocal sign of a conservative ideology*) *can only avail itself (...) in a ignorant or elitist attitude*²². This view, close to Kennedy's conception, is not indeed uniform or prevailing. Bulygin observed that *even if the law contains many ethical assessments, this is not a reason to deny the theory of law is – or should rather be – descriptive*²³.

In short, with different semantic or conceptual clothes, and different attitudes or beliefs, the problem continues today in the same way as when Hans Kelsen wrote the preface of the first edition of *Pure Theory of Law* in 1934, revealing the search of a remote or equidistant perspective regarding the influence of the political gales of the age²⁴. What was discussed there could be said to be an *epistemological* problem. Undoubtedly it was. But it was also something

²² Manuel Atienza, *Current Argentine philosophy of law*, Depalma, B. Aires, 1984, p. 232.

²³ Eugenio Bulygin, in response to J. Raz in: *A discussion on the theory of law*, Marcial Pons, 2007, p. 109. In another text on the pure theory repeats that *legal science consists in the description of positive law and not in their assessment "as it is a" matter of politics not science* (in *The problem of the validity in Kelsen*, several studies under the title: *Validity and effectiveness of the law*, Astrea, 2005, p. 102)

²⁴ After narrating the attacks the his *theory* had received from so different sectors (v. gr. Fascism and communism), he says that "if with everything" he dared "in those days" to show his work, it was "with the hope that a younger generation does not remain, in the wild uproar of our days, without believing in a free legal science [...]". Almost two decades later, Bertrand Russel insisted in the fallibility of scientific theories which *no sensible considers immutably perfect*, and the consequences for 'practical politics' of such an intellectual attitude, especially *tolerance*; and urged to defend liberal beliefs, supported also by a democratic socialism, without shyly apologizing to *dogmatism of left and right leanings*, but *deeply persuaded of the value of freedom, scientific independence and mutual tolerance* (in *Philosophy and politics*, part of the quoted *Unpopular essays*, chapter I, p. 28 et seq.).

else Kelsen emphasized it instead of silencing it. The epistemological question, as an issue that interests the theory of law, remains in the classrooms and academic campuses. But the practical consequences of the problem go beyond these areas and are projected in the activity of the protagonists, the law operators, people *of flesh and bone* as Genaro Carrió used to say, and it also directly affects people's life in general. Hence the practical interest of these issues.

Autor convidado.